

MEMORANDUM

FROM: Air Facility System (AFS) Configuration Control Board (CCB)

TO: AFS Users

SUBJECT: Ensuring Consistency in Penalty Reporting to AFS

This provides guidance on penalty reporting to the users of the Air Facility System (AFS). The guidance establishes definitions and conventions for standard reporting of penalty amounts, penalty amendments, and costs associated with supplemental enforcement projects (SEPS). The guidance is immediately applicable for EPA reporting. State and local agencies are strongly encouraged to follow the guidance but are not required to do until modified Minimum Data Requirements (MDRs) are published in the Federal Register.

This guidance answers the following key questions presented by the user community:

- How are penalties defined in AFS?
- How are penalties reported to AFS?
- What is NOT included in an assessed penalty?
- How is a change to a penalty reported in AFS?
- How should Appeals be tracked in AFS?
- How should penalties be reported for Civil Referrals/Actions?
- What is a Supplemental Environmental Project (SEP)?
- What is the Penalty Assessment Value of a SEP?

How are penalties defined in AFS? Penalties in AFS are defined as **the dollar amount of any cash penalty which is either:**

1. **Assessed (i.e. required) by an administrative order, consent agreement/order, or consent decree, or,**
2. **Proposed under a civil referral or civil filing.**

How are penalties to be reported in AFS? Penalties in AFS are reported in conjunction with an action type. The action type, a two-digit code, defines the activity. Also required in action reporting is the applicable air program(s) and the date the action was achieved. The penalty field (PAM1) is a seven-digit numeric field on the action record. Penalties or values exceeding the seven-digit limit of the PAM1 field can still be reported using a new enhancement to AFS. Users can now enter an alpha K after a value of thousands of dollars to report larger penalties. This enhancement does not impact users reporting penalties of \$9,999,999 or less.

How is a change to a penalty reported in AFS? Assessed penalty amounts often change when an assessed penalty is appealed. Currently, there is no national standard method for reporting the change of a penalty in AFS.

Recommendation: To best use AFS in its current state, it is recommended that changes to a formal enforcement penalty be reported in the following 2-step process:

- 1. Use of a new National Action type documenting the existence and amount of a penalty modification, and**
- 2. Utilizing the action linking capabilities of AFS through either the High Priority Violator (HPV) or Non-HPV pathway and linking appropriate actions together.**

See Attachment One for further technical discussion

What is NOT included in an assessed penalty? **The penalty does not include stipulated penalties, the value of any Supplemental Environmental Projects (SEPs), or the value of any injunctive relief.** See the discussion below for more information on SEPs.

What is a Supplemental Environmental Project (SEP)? Supplemental Environmental Projects (SEPs) are environmentally beneficial projects completed as part of an enforcement settlement. Reporting of SEPs in AFS are not part of the MDRs outlined in the AFS Information Collection Request. If a SEP is part of an enforcement settlement, it is recommended (but not required) that it be reported via a separate action type in AFS. The National Action Type for Federal SEPs is _____, State/Local SEPs is _____. Each Region will have to map to these codes in order to begin using these action types. **The value of the PAM1 field in a SEP action is the dollar value of the project pursuant to the final order/decreed/agreement.** This is the cost to the Defendant of implementing the SEP. SEP costs **shall not** be included in the formal enforcement action penalty.

What is the Penalty Assessment Value of a SEP? Additionally, State or Local Agencies may designate that a portion of a SEP cost mitigates or lowers the total assessed cash penalty. This penalty assessment value may be reported to AFS via National Action Type _____, State SEP Penalty Assessment Value. The value of the PAM1 field in this action is that portion of the SEP value which is denominated as a civil penalty assessed in a final order/decreed/agreement. By Federal policy, this concept is not accepted for Federal SEPs. The Penalty Assessment Value of a SEP is not (at this time) an MDR for AFS reporting.

CCB Issue: However, IDEA/OTIS/ECHO reports will add include the Penalty Assessment Value of SEPs in official penalty statistics.

How should penalties be reported for Civil Referrals/Actions? Federal and State Civil Referrals, and associated proposed penalties, are included in the AFS Minimum Data Requirements and therefore must be reported to AFS. Any proposed penalty should also be reported in the referral action type. State referrals are reporting using the State National Action Type 1E, Federal referrals are reported using National Action Type 4B. Civil Referrals are the actions taken to file a civil complaint or the preparation of a litigation report to initiate civil action. State Civil Actions are the actual filings of a civil complaint against a source by the State Attorney General in a State Court, State National Action Type 9C, and include assessed penalty. Civil Referrals may also be followed up with a Consent Decree action. If a violation pathway is used for a civil

action, IDEA/OTIS/ECHO will use the last dated penalty value (referral or filing or consent decree) as the final penalty assessed value.

After reporting Federal Civil Referrals, the actual filings can now be reported using the new Federal National Action Type ____, Federal Civil Action. This is an optional reporting type for Federal AFS users. EPA manages Federal Civil Actions from the Integrated Compliance Information System (ICIS), but users can document all of their civil action activity in AFS adding valuable information for HPV pathways. New National Action Types have been created for the reporting of Federal Civil Actions, in order to clarify and align the reporting structure with that of the State Civil Referral/Action reporting stream.

The clarification of the penalty definition and additional of new National Action Types will help to clearly define our existing data in AFS, and ensure future reporting is standardized. See Attachment 2 of this guidance for a summary of the recommended action types for enforcement reporting. Please see Attachment 3 of this guidance for complete action type descriptions of all of the referenced actions. Should you have any questions concerning the definitions or use of the penalty field for reporting enforcement activity, please call your local Regional AFS Compliance Manager, or the AFS Help Line at (800) 367-1044.

Attachments

ATTACHMENT 1:

Reporting Modified Penalty Assessment Amounts to AFS

Step 1: For Federal 113(D) Administrative Penalty Orders, an appropriate AFS action type for Federal Modified Penalty is already available as action type C2. For other Federal orders a new national action types, FM - Federal Modified Penalty Assessed, is established. For State penalty assessment modifications, a new national action type SM - State Modified Penalty Assessed, is now available to document when an assessed penalty is appealed to a new penalty amount. These actions are only to be used in the case of a successful appeal to a formal enforcement action. Each Region will add or modify appropriate Regional action types to these new National action types. It is required that Federal Users of AFS report a modified penalty. State and Local Agencies have the option of reporting this action type.

Step 2: Link the Modified Penalty Assessed action to an appropriate High Priority Violator pathway, or create a Non-HPV pathway. Formal actions that address an HPV will have an established pathway. Should a penalty be changed, the modifying action can be linked to the appropriate Day Zero action. If the penalty assessed is not part of an HPV action, then the Non-HPV Pathway actions should be used. The Date Achieved of the Non-HPV Pathway should reflect the date of the original enforcement action.

For example: XYZ Corporation receives a State Administrative Penalty Order on May 1, 2003, with an assessed penalty of \$30,000. The action reported to AFS would use the appropriate Regional action type for 8C, State Administrative Order, a date achieved of 030501, and a penalty of \$30,000. This formal enforcement action was not a High Priority Violator. XYZ Corporation initiates an appeal to the State on June 2, 2003. On June 9, 2003 the appeal is concluded. The appeal resulted in a reduction of the formal penalty to \$20,000. The optional State action ___, State Modified Penalty Assessed could be entered documenting the change in penalty. A new linkage of actions could be reported using National Action Type NH-State Non-HPV Pathway. The formal enforcement action and the action documenting the penalty modification can be linked to this pathway. As the modified penalty is contained in a linkage, OTIS reports would count the modified penalty of \$20,000 as final instead of the original \$30,000 penalty.

With use of the optional reporting, AFS would have the following actions:

<u>ACT NO</u>	<u>DESCRIPTION</u>	<u>DATE</u>	<u>PENALTY</u>	<u>LINK</u>
Action 004	NON-HPV PATHWAY	030501		KEY
Action 002	ST ADMIN ORDER	030501	\$30,000	004
Action 003	ST MOD PENALTY ASSESS	030609	\$20,000	004

The use of the Modified Penalty Assessed action type will prevent misinterpretation of additional assessed penalties. State use of the action type is optional, but considered mandatory

for Federal reporters. Each Region will have to map to these codes in order to begin using these action types.

Reports for the Online Targeting Information System (OTIS) and Enforcement Compliance History Online (ECHO) will be modified to report the last penalty amount in a violation pathway (HPV or Non-HPV pathway).

ATTACHMENT 2

SUMMARY OF THE RECOMMENDED ACTION TYPES FOR ENFORCEMENT REPORTING

Activity	Federal	State	Penalty
Administrative Orders	8A	8C	YES-ASSESSED
Civil Referrals	4B	1E	YES-PROPOSED
Civil Actions	XX*	9C	YES-ASSESSED
Consent Decrees/Agreements/Orders	6B	2D	YES-FINAL
113(D) APO Complaint Filed	7F	----	YES-ASSESSED
113(D) APO Recalculated (Final)	C2	----	YES-FINAL
Supplemental Environmental Project (SEP) (State Optional Reporting)	XX*	XX*	YES-VALUE
SEP Penalty Assessment Value (State Optional Reporting)	----	XX*	YES-VALUE
Modified Penalty Assessed Used in HPV and Non-HPV Action Linking (State Optional Reporting)	XX*	XX*	YES-ASSESSED
Non-HPV Pathway** Used when reporting Modified Penalty Assessed (State Optional Reporting)	XX*	NH	NO

*New National Action Types

**New Definition

ATTACHMENT 3

NATIONAL ACTION TYPE DEFINITIONS FOR SELECTED ENFORCEMENT ACTIONS

8A/EPA 113(A) ORDER ISSUED: An administrative order issued by EPA pursuant to the authority granted under Section 113(a) of the Federal Clean Air Act as amended in 1990. Penalties reported are the assessed dollar amount of any cash civil penalty. This action is an addressing action for a high priority violation, and is to be used in action linking.

8C/STATE ADMINISTRATIVE ORDER ISSUED: A State administrative action (not civil or criminal) against a source with or without an assessed penalty amount that has been determined by the appropriate authority for violating SIP or State-delegated Federal regulations. Penalties reported are the assessed dollar amount of any cash civil penalty. This action is an addressing action for a high priority violation, and is to be used in conjunction with action linking.

4B/EPA CIVIL REFERRAL: Action taken by EPA to file a civil complaint in Federal court pursuant to the authority granted under State law for violating applicable State regulations or State-delegated Federal regulations. Additionally, this action is to be used in the preparation of a litigation report to initiate a Federal civil action against a non-complying source and submittal to Headquarters is imminent (to be counted here the litigation report must have the Regional Air Director approval). Penalties reported are the assessed dollar amount of any cash civil penalty. This is an addressing action for a high priority violation. This action is Enforcement Sensitive. If this action is used in a High Priority Violator case, action type OT is also required.

OT/OTHER ADDRESSING ACTION: This action type covers several miscellaneous addressing actions. It is often used to document that an air pollution enforcement agency has completed work by referring a case for civil or criminal action.

9C/STATE CIVIL ACTION: This is the filing of a civil complaint against a source by the State Attorney General in a State Court. Action is taken by a State or Local to file a civil complaint against a source in the State court pursuant to the authority granted under State law for violating applicable State-delegated Federal regulations. Penalties reported are the pled dollar amount of any cash civil penalty. This action is an addressing action for a high priority violation, and is to be used in action linking. This action is Enforcement Sensitive.

XX/FEDERAL CIVIL ACTION: This is the filing of a civil complaint against a source by the Department of Justice in Federal Court. Action is taken to file a civil complaint against a source in Federal court pursuant to the authority granted under the Clean Air Act. Penalties reported are the dollar amount of any pled cash civil penalty. This action is an addressing action for a high priority violation, and is to be used in action linking. This action is Enforcement Sensitive.

2D/STATE COURT CONSENT DECREE: A decree signed by the primary enforcement authority, the source, and by the court requiring a source violating an applicable Federal or SIP regulation to attain compliance by means specified in the decree. Consent Decrees and consent

agreements should be tracked here if they are formally signed. This is an addressing action for a high priority violator. Penalties reported are the assessed dollar amount of any cash civil penalty. ***CCB Issue: Historically, some Regions have used national action type 2D for Consent Agreements/Orders (CACOs) as well. Should this use be continued or do we need a separate national action type for CACOs?***

6B/EPA COURT CONSENT DECREE: A decree signed by EPA, the source, and by the court requiring a source violating an applicable Federal or SIP regulation to attain compliance by means specified in the decree. Consent Decrees and consent agreements should be tracked here if they are formally signed. This is an addressing action for a high priority violator. Penalties reported are the assessed dollar amount of any cash civil penalty.

CCB Issue: Historically, some Regions have used national action type 6B for Consent Agreements/Orders (CACOs) as well. Should this use be continued or do we need a separate national action type for CACOs?

7F/EPA 113(D) APO COMPLAINT FILED: EPA Administrative Penalty Order (APO), date proposed compliant is filed, with proposed penalty. First step of administrative penalty actions used for the Compliant and Notice of Opportunity for Hearing issued pursuant to Section 113(d) of the Clean Air Act, followed by C2, 113(d) APO Recalculated, and then finished with C3, APO Collected. This action is an addressing action for a high priority violation, and is to be used in action linking.

C2/EPA 113(D) APO RECALCULATED: Federal Consent Agreement and Consent Order for a 113(D) action. This is often the second reportable step in the APO process and should be reported along with the recalculated penalty amount. This action is an addressing action for a high priority violation (although the addressing nature of this action is normally redundant to the already filed 7F action), and is to be linked to the original pathway establishing action.

XX/FEDERAL SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP): An environmentally beneficial project which a defendant/respondent in a Federal case agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform. The value of the penalty is the dollar value of the project pursuant to the final order. SEP costs are not included in the formal enforcement action penalty.

XX/STATE SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP): An environmentally beneficial project which a defendant/respondent in a State/Local Agency case agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform. The value of the penalty is the dollar value of the project pursuant to the final order. SEP costs are not included in the formal enforcement action penalty.

XX/STATE SUPPLEMENTAL ENVIRONMENTAL PROJECT (SEP) PENALTY ASSESSMENT VALUE: State or Local Agencies may allow a SEP to mitigate or lower a cash penalty. The value of the PAM1 field in this action is that portion of the SEP value which is denominated as a civil penalty assessed in a Final Order. This action type is not available for

Federal use. This action is also not part of mandatory AFS reporting.

CCB Issue: However, IDEA/OTIS/ECHO reports will add include the Penalty Assessment Value of SEPs in official penalty statistics

XX/FEDERAL MODIFIED PENALTY ASSESSED: This required action type documents the change of penalty via an appeal or other administrative/judicial process. Used in conjunction with action linking, a pathway is created that links the original enforcement action and penalty modification, to clearly provide information to the user concerning the final penalty assessment. Action linking can be completed in the HPV (National Action Type 2Z) or Non-HPV pathway (National Action Type XX).

NH/STATE NON-HIGH PRIORITY VIOLATOR PATHWAY: Optional use for State and Local Agencies. This action type creates an action linking pathway used to document a series of activities consequent to a violation not necessarily covered by the High Priority Violation policy. This pathway can be used to document modified penalties through an appeal or other administrative/judicial process. Other activities utilizing the action linking capabilities of AFS may also be reported at the discretion of the user.

XX/FEDERAL NON-HIGH PRIORITY VIOLATOR PATHWAY: Mandatory action type for Federal reporters creates an action linking pathway used to document a series of activities consequent to a violation not necessarily covered by the High Priority Violation policy. This pathway can be used to document modified penalties through an appeal or other administrative/judicial process.